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July 13, 2006

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Hearing Officer's Decision

Name of Case: Personnel Security Hearing

Date of Filing: March 1, 2006

Case Number: TSO-0363

This Decision concerns the eligibility of XXXXXXXX (hereinafter the individual) to hold an access authorization.¹ The regulations governing the individual's eligibility are set forth at 10 C.F.R. Part 710, "Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material." This Decision will consider whether, based on testimony and other evidence presented in this proceeding, the individual's suspended access authorization should be restored. As discussed below, I find that the individual has met his burden to bring forward sufficient evidence to show that his access authorization should be restored.

I. Background

A. The Notification Letter

This administrative review proceeding began with the issuance of a Notification Letter, informing the individual that information in the possession of the DOE created substantial doubt pertaining to his eligibility for an access authorization. In accordance with 10 C.F.R. § 710.21, the Notification Letter included a detailed statement of the derogatory information.

Specifically, the Notification Letter indicated that a DOE consultant psychologist diagnosed the individual as suffering from Bi-polar Disorder I, most recent episode manic, in full remission. According to the letter, the DOE consultant psychologist found this

¹/ An access authorization is an administrative determination that an individual is eligible for access to classified matter or special nuclear material. 10 C.F.R. § 710.5.

disorder causes or may cause a significant defect in the individual's judgment or reliability. The letter also noted that on several occasions, the individual did not take his bi-polar medication, believing it was not necessary. The letter stated that this information creates a security concern under 10 C.F.R. § 710.8(h) (Criterion H).²

B. The DOE Consultant Psychologist's Report

The DOE consultant psychologist evaluated the individual on September 7, 2005, and set forth his diagnosis of Bi-polar I Disorder in a report dated October 1, 2005. The consultant psychologist pointed out that the disorder could create a mood disturbance that is sufficiently severe to cause marked impairment in occupational functioning to the point that hospitalization becomes necessary. However, the consultant psychologist stated in his report that the disorder is treatable and that the individual did not appear to have a defect in his judgment at the time of the evaluation. He pointed out that the "individual had received appropriate rehabilitation and had demonstrated a significant period of stabilization without serious event or symptoms for approximately two and one half years." The consultant psychologist also stated that the individual "appears to now have insight into the need for continuing medical follow-up and agrees to comply with his physician's recommended treatment."

With respect to the future, the consultant psychologist recommended that the individual "should be followed by his psychiatrist indefinitely, until he is deemed appropriate for discharge, to assure full compliance with all medical recommendations." He believed that the individual should be monitored on an occasional basis by the site psychologist at the plant where the individual is employed. In this regard, the consultant psychologist pointed out that "an appropriate measure of judgment and reliability pertaining to the condition of Bipolar Disorder is not just symptom status, but also refers to managing stress, social rhythms (relapse prevention), and medication compliance."

C. The Hearing

The Notification Letter informed the individual that he was entitled to a hearing before a Hearing Officer in order to respond to the information contained in that Letter. The individual

² Criterion H relates to a mental condition which, in the opinion of a psychiatrist causes or may cause a significant defect in judgment or reliability.

requested a hearing, and that request was forwarded by the DOE Office to the Office of Hearings and Appeals (OHA). I was appointed the Hearing Officer in this matter. In accordance with 10 C.F.R. § 710.25(e) and (g), the hearing was convened.

At the hearing, the individual was represented by an attorney. The individual testified on his own behalf, and presented the testimony of his treating psychiatrist (individual's psychiatrist), the staff psychologist at the site where the individual is employed (site psychologist), his mother, a family friend, a personal friend and his supervisor. The DOE Counsel presented the testimony of the DOE consultant psychologist. The individual also introduced several documents into the record.

II. Hearing Testimony and Documents

A. Testimony

The Individual

The individual described a 1997 incident that gave rise to the initial bi-polar diagnosis. This incident took place at work. The individual was not working for the DOE at that time. The individual indicated that he was angry and upset over an incident that took place at the work site, and that his wife convinced him to admit himself into a hospital for observation regarding his mental status. It was at this time that he was first diagnosed with bi-polar disorder. He stated that he was at first not convinced that this diagnosis was correct. He indicated that during that hospital stay he initially refused medication. He also indicated that several years ago he went without medication for a period of 24 months in order to "test" whether he would have a bi-polar incident during that period.³ He stated that he did not have an episode during that time. He testified that this type of experimentation is now behind him and that he presently recognizes that he needs to be on medication. He stated that he does not want to be a risk, and because he "values that and respects that" he complies with his doctor's recommendation and that of the site psychologist regarding continuing to take medication as prescribed. He believes that he is receiving a benefit from his counselor⁴ and his psychiatrist. He states that he will continue to see his psychiatrist every three months because he wants to be in

³According to the record, this incident occurred between 1998 and 2000. Individual's Hearing Exhibit C.

⁴The counselor is working with the individual on personal relationship issues, not on his bi-polar disorder.

compliance with his treatment plan. He will continue to see his counselor until both agree that it is no longer necessary.

The individual also indicated that his brother and sister both suffered from bi-polar disorder, and he is therefore familiar with the symptoms of a bi-polar episode. He stated that if he believed he were experiencing such an episode, he would immediately contact his psychiatrist or his mother. He believes he has a plan in place to cope with his disorder. He also stated that he is able to manage stress by leading an active life and has normal eating and sleeping cycles. Transcript of Hearing (hereinafter Tr.) at 71-96; 114-133; 182.

Personal Witnesses

The individual's personal witnesses included his mother, his supervisor, a personal friend and a family friend. These witnesses all believed the individual to be stable and reliable, and to show good judgment. None had ever seen unusual mood swings in the individual. Tr. at 15-21; 23-28; 33-58; 62-63.

The Three Expert Witnesses: the Site Psychologist; Individual's Psychiatrist; DOE Consultant Psychologist;

1. Site Psychologist

The site psychologist is a clinical psychologist employed by the Occupational Health Services Unit at the plant where the individual works. His responsibilities include evaluating employees' psychological fitness for duty. He was not convinced that the individual suffers from bi-polar disorder. Based on his review of the individual's medical records, he does not believe that the individual has ever experienced a "classic manic or even a hypo-manic episode." Tr. at 142-43.⁵ He testified that if the individual does suffer from bi-polar disorder, it is a "mild variant of that condition." Tr. at 162. The site psychologist did not believe there was a reason to be particularly concerned over

⁵ Referring to the Diagnostic and Statistical Manual of Mental Disorders Fourth Edition-Text Revision (DSM-IV-TR), he described in detail why he believes that the individual's symptoms do not fall within the criteria for bi-polar disorder. Tr. at 143-52.

the individual's questioning the diagnosis and temporary rejection of his medicines. He believed that there is some room to question this diagnosis and that this individual is a "healthy functioning person who wants to know." Tr. at 165-66. However, ultimately, the site psychologist believes that the individual should continue with his medication, as prescribed by his psychiatrist, and he is convinced that the individual will do so. Tr. at 160, 166, 176. He believes that the three and one-half year period during which the individual has maintained compliance with his medication regime is sufficient to demonstrate that he will continue to do so in the future. Tr. at 161, 167, 176.

2. Individual's Psychiatrist

The individual's psychiatrist testified that he has been treating the individual for bi-polar disease since January 2003. The individual's psychiatrist did not have any first hand knowledge that the individual suffers from bi-polar disorder. He did not see any evidence of the manic phase of the condition in this individual. Tr. at 110.⁶ He based his diagnosis on prior history, although he stated he had no reason to disagree with the diagnoses made by other physicians. Tr. at 103. He believed the individual's overall medical record to be consistent with bi-polar disorder. Tr. at 111. His treatment consists of providing the individual with medication. He stated that the individual has consistently taken his medication (lithium) as prescribed. This testimony was based on the fact that he regularly tests the individual to insure that his medication is at therapeutic levels in his blood. Tr. at 99-100, 104. He sees the individual every three months for "medication management." Tr. at 100-101. He believes the individual is reliable, conscientious and will continue to take his medication as prescribed. Tr. at 101. Like the site psychologist, this witness did not view with great concern the fact that the individual had ceased taking his medication several years earlier. Tr. at 106.

3. DOE Consultant Psychologist

After hearing the testimony from all the above witnesses, the consultant psychologist provided an updated opinion of the status of this individual. He believed that the individual is currently in a mentally stable situation, given the testimony of the individual's psychiatrist. The consultant psychologist also

⁶ He stated that he had seen some signs of depression in the individual but characterized it as "situational" and not requiring intervention. Tr. at 110.

believed that the individual has so far been compliant with the medication regime prescribed by his psychiatrist. However, based on what he saw as the individual's history of resistance to medication, he expressed a longer-range concern over whether the individual would continue his compliance. He believed that without some safeguard in place, there is a risk that the individual might discontinue his medication. He therefore recommended that the individual reach an agreement with his psychiatrist to provide verification to the site psychologist that the individual is continuing with his medication program. Tr. at 167-74. See also October 1, 2005 Report.

B. Hearing and Post-Hearing Documents

The individual entered several exhibits into the record at the hearing. He submitted his resume (Individual's Hearing Exhibit A). He also submitted statements by several friends and colleagues who all indicated that they have known the individual for a number of years and find him to be reliable, and trustworthy (Individual's Hearing Exhibit C). The individual also submitted an updated report from the site psychologist (Individual's Hearing Exhibit B). The site psychologist evaluated the individual on the day before the hearing, and prepared his updated evaluation on that same day. He set forth his opinion that the individual does not have Bi-polar I disorder. He stated that he believes the individual is at risk of experiencing a manic episode, and for this reason should remain on medication. The site psychologist indicated that the individual is fit for duty. Overall, he did not find with respect to this individual "any derogatory information within the purview of 10 C.F.R. § 710.8."

After the hearing the individual submitted a statement from his therapist, who has been treating the individual since 2004 for relationship issues. While the therapist is aware that the individual has been diagnosed with bi-polar disorder, he indicated that he has never seen any evidence of the disorder, and finds the individual emotionally stable. The therapist is aware that the individual is taking medication for bi-polar disorder, and stated that he has no reason to disbelieve the individual's assertions that he has been compliant with the medication regime. Submission of June 23, 2006.

The individual also submitted a statement from his psychiatrist confirming that he is willing to provide a copy of the individual's future lithium test results to "appropriate authorities" for the

purpose of monitoring his compliance with his bi-polar treatment. Submission of June 26, 2006.

III. Standard of Review

A DOE administrative review proceeding under 10 C.F.R. Part 710 is not a criminal case, in which the burden is on the government to prove the defendant guilty beyond a reasonable doubt. In this type of case, we apply a different standard, which is designed to protect national security interests. A hearing is "for the purpose of affording the individual an opportunity of supporting his eligibility for access authorization." 10 C.F.R. § 710.21(b)(6). The burden is on the individual to come forward at the hearing with evidence to convince the DOE that granting or restoring his access authorization "would not endanger the common defense and security and would be clearly consistent with the national interest." 10 C.F.R. § 710.27(d).

This standard implies that there is a strong presumption against the granting or restoring of a security clearance. See Dep't of Navy v. Egan, 484 U.S. 518, 531 (1988) ("the clearly consistent with the interests of the national security test" for the granting of security clearances indicates "that security-clearance determinations should err, if they must, on the side of denials"); Dorfmont v. Brown, 913 F.2d 1399, 1403 (9th Cir. 1990)(strong presumption against the issuance of a security clearance). Consequently, it is necessary and appropriate to place the burden of persuasion on the individual in cases involving national security issues. Personnel Security Hearing (Case No. VSO-0002), 24 DOE ¶ 82,752 at 85,511 (1995).

Once a security concern has been found to exist, the individual has the burden of going forward with evidence to rebut, refute, explain, extenuate or mitigate the allegations. Personnel Security Hearing (VSO-0005), 24 DOE ¶ 82,753 (1995), aff'd, 25 DOE ¶ 83,013 (1995). See also 10 C.F.R. § 710.7(c).

IV. Analysis

As is evident from the above testimony, the experts disagree on the precise diagnosis of this individual's mental condition. The site psychologist is not fully convinced that the individual suffers from bi-polar disorder. However, he believes that if the individual is suffering from bi-polar disorder it is a mild form. He referred to the individual's condition as "Bi-polar not otherwise specified." Tr. at 161. The DOE consultant psychologist believes the individual does suffer from bi-polar disorder. The individual's psychiatrist has also accepted the diagnosis of bi-polar disorder. This is based

on prior history. He has never seen the individual experience a bi-polar episode, or exhibit any symptoms of bi-polar disorder. Nevertheless, even though the experts do not agree on the exact nature of the individual's illness, they agree that this individual has a mental condition requiring medication to ensure that he is mentally stable. Therefore, they do all express a concern that gives rise to a Criterion H security concern. I must therefore consider whether that concern has been mitigated.

As an initial matter, I believe that the individual's mental condition is currently stable and that he behaves reliably and responsibly. All witnesses corroborated this conclusion. I also believe that the individual is currently adhering to his medication regime, as prescribed, and has been doing so for several years. The individual's psychiatrist corroborated this point.

I do not believe that there is any reason to be unusually concerned that he will experience a bi-polar episode as long as he continues to take his medication as prescribed. Even so, I believe that the individual is sufficiently familiar with bi-polar disorder to recognize the onset of an episode and immediately seek help. Tr. at 127-28.

However, given the fact that several years ago the individual stopped taking his medication, there was some concern expressed by the DOE consultant psychologist that the individual may in the future again decide to stop his medication. If the individual decided to do so without approval by his physician or psychiatrist, it could present a security concern. Therefore, I must consider whether the individual has established that he will continue with his medication regime as long as it is medically recommended. As discussed below, I am convinced that he has.

First, two experts, the individual's psychiatrist and the site psychologist, both believe that the individual is reliable and will remain compliant with his medication regime. Neither saw any reason to be especially concerned about the non-compliance incidents. Moreover, both of these witnesses have been in frequent contact with the individual for a considerable period. The individual's psychiatrist has been treating him for about three and one-half years, and sees him every three months. The site psychologist had his first contacts with the individual in March 2003 and September 2003. He has also had contact with the individual on ten occasions during the period January 2006 through May 2006. Individual's Hearing Exhibit B. Based on these long-term relationships and frequent contacts with the individual, these two experts know him well, and are in a good position to judge his reliability.

On the other hand, the DOE consultant psychologist has had only one brief contact with the individual in 2005, for the purpose of conducting the evaluation for the DOE. He did not have any current knowledge about this individual which led him to believe that the individual would, in the future, become non-compliant. His sole reason for questioning the reliability of the individual's assertions that he will stay on his medication appears to be that in 1998, the individual stopped taking his medication. I do not believe that this concern overcomes the opinions of the two other experts, which are more current and are based on their personal knowledge and detailed, current observations of this individual. I therefore find the opinions of the individual's psychiatrist and the site psychologist more persuasive on this issue.

There is other evidence on this point in the individual's favor. The last non-compliance incident took place from 1998 through 2000. This period is now well in the past. The individual's psychiatrist testified that all of the individual's blood tests confirm that his medication is at the therapeutic level, and he has been treating the individual since January 2003. Tr. at 99-100. Thus, the individual has been taking his medication at therapeutic levels for about three and one-half years. Accordingly, I am convinced that the individual has been compliant at least for that period. I believe that the three and one-half year time frame is a long enough period from which to conclude that the individual is likely to maintain compliance in the future.

In addition, the individual testified that he is in a very different place in his life now, from the non-compliance period, which was about six years ago. He has moved on since that time. He now recognizes not only the importance of continuing his medication, but also that the decision to test what would happen if he ceased his medication was a poor one. Tr. at 182. In this regard, I believe that the individual cares deeply about his personal well being. He testified that he exercises, rests, eats well, has numerous hobbies and interests, understands how to relieve stress in his life, and is deeply involved in his church. Tr. at 89-91; 130-31; This indicates to me that he is conscious of the importance of and the need to maintain his physical, mental, and spiritual health. I therefore believe that he would not want to endanger any aspect of his overall well being by ceasing his medication.⁷

⁷The individual's willingness to have his psychiatrist provide the staff psychologist with blood test reports confirming that his medication is at therapeutic levels is a mitigating factor that is strongly in the individual's favor. However, only the Office of Security Affairs is authorized to grant a

V. CONCLUSION

As the foregoing indicates, the individual has provided a persuasive showing that his mental health is currently stable, and that he recognizes the importance of following the medication regime prescribed by his psychiatrist. I am persuaded that he will continue his therapy as long as his psychiatrist and counselor believe it is necessary, and that he recognizes the importance of seeking immediate professional help, should bi-polar symptoms appear. I believe that the individual is very knowledgeable about this condition, and will act quickly and appropriately to maintain his stability. I am convinced he has a strong support system that includes his mother, personal friendships, and his church, and that this is also an important factor that promotes his mental stability. The individual has convinced me that he is committed to maintaining the regular routine that is necessary for continuing his mental stability.

Based on the considerations set forth above, I find that the individual has resolved the security concerns under 10 C.F.R. § 710.8(h). It is therefore my decision that his suspended access authorization should be restored.

The parties may seek review of this Decision by an Appeal Panel under the regulation set forth at 10 C.F.R. § 710.28.

Virginia A. Lipton
Hearing Officer
Office of Hearings and Appeals

Date: July 13, 2006

⁷(...continued)

contingent access authorization. My assessment here that the individual's access authorization should be restored is not contingent upon continued monitoring. I believe that the individual is mentally stable while on medication, and the risk that the individual might cease taking his medication is at an acceptably low level. See *Personnel Security Hearing* (Case No. TSO-0320), 29 DOE ¶ 82,920 (2006)(discussion of acceptable level of risk of relapse).